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CONTROL OF FOREIGN CORPORATE ACTIVITY BY THE STATE OF INCORPORATION

WILLIAM DENNIS HAWKLAND*

Few aspects of corporation law are less understood by lawyers than the apparently difficult problems which result from the attempts of corporations to exercise in foreign states some powers which they could not have availed themselves of in the state of incorporation. The confusion involved when questions arise concerning the powers of foreign corporations can be traced largely to the tendency of the courts to use the language and concepts of antiquated cases and theories. This unfortunate by-product of the doctrine of *stare decisis* has led some courts into the error of feeling compelled to honor restrictions placed on corporations by the state of incorporation, and it has induced lawyers to approach the question by considering charter provisions and foreign legislation rather than the choice of law rules of the forum. The purpose of this paper is to call attention to the factors which have promoted these misconceptions and to show that the problems which result when a corporation attempts to exercise, in a foreign state, powers denied to it by the state of incorporation are really quite simple conflict of laws situations in which the jurisdictional contacts are divided between the two states so that the foreign state, when it is the forum, can resolve the problem without in any way deferring to the laws of the incorporating state.

When corporations were first emerging as a new form of business association, the sovereigns feared that they would monopolize all of the commercial world if not strictly regulated. To prevent this anti-social growth a definite policy was promulgated to limit corporate power by making corporate action impossible beyond the scope of the charter.¹ This policy was easily effectuated because only the state of incorporation could grant charters, and corporations came to be thought of as invisible, intangible creatures having their existence only in contemplation of law² and possessing only those powers expressly granted by charter.³ Since it was said that a corporation could not "exist" without its charter, the corporate charter had to be "carried" everywhere the corporation went to do business, and, theoretically, the limitations imposed therein were just as effective abroad as at home.⁴ The

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1. See BERLE AND WARREN, *BUSINESS ORGANIZATION: CORPORATIONS* 45 (1948).

2. See *Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819).

3. *Central Transportation Co. v. Pullman's Palace Car Co.*, 130 U.S. 24 (1890). See *Dartmouth College v. Woodward*, *supra* note 2 at 536; *Schneider v. Greater M. & S. Circuit, Inc.*, 144 Misc. 534, 539, 259 N. Y. Supp. 319, 323 (Sup. Ct. 1932).

4. "Every corporation necessarily carries its charter wherever it goes for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is

charter limitations, moreover, included appropriate legislation enacted by the incorporating state subsequent to the incorporation, because it was thought that where the state had reserved the right to alter, suspend, or repeal any corporate charter, the corporation was made subject to later limitations resulting from such legislation.⁵ In short, the theory of charter limitations had the effect of giving the incorporating state ultimate authority over the activities of its corporations even though such activities were wholly exercised in another jurisdiction. While this authority does not seem to have been challenged by the foreign states in the early cases, it is at least possible that the foreign state was not really compelled to judge the powers of corporations coming into its jurisdiction by reference to their charters, but simply did so as a conflict of laws choice of law matter in which it was thought propitious not to use local law in resolving the question.⁶ Of course, not all charter limitations were effective in foreign states since some were expressly intended to have only local effect,⁷ and the necessity of characterizing the restraints as "general" or "local" gave the foreign courts some latitude in the matter. But, it is undoubtedly true that the foreign courts, whether or not compelled to so reason, almost⁸ always thought that the incorporating state could properly limit the foreign activities of its corporations, and the cases involving such activities were resolved by a careful considera-

bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution." *Relfe v. Rundle*, 103 U.S. 222, 226 (1880).

5. *Missouri Pac. Ry. Co. v. Kansas*, 216 U.S. 262 (1910); *Asbury Hospital v. Cass County*, 72 N.D.359, 7 N.W.2d 438 (1943); see *Zabriskie v. Hackensack, N. Y. Ry. Co.*, 18 N. J. Eq. 178 (1867). This reservation was made necessary by the famous *Dartmouth College Case*, *supra* note 2, which held that a charter granted by the legislature to a corporation is a contract between the state and the corporators and that the state cannot constitutionally take away or impair any of the franchises or privileges granted by it. The assumption that the legislative grant is a contract is clearly inconsistent with current thinking. See Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. OF PA. L. REV. 585, 593-594 (1927).

6. By strong dictum the leading case of *Bank of Augusta v. Earle*, 19 Pet. 519, 587-588 (U. S. 1839) stated that a corporation is everywhere bound by its charter. Said the court, "... and it may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter ... and if the law creating a corporation, does not, by the true construction of the words used in the charter, give it the right to exercise powers beyond the limits of the state, all contracts made by it in other states would be void." Other cases, like *Canada So. Ry. Co. v. Gebhard*, 109 U. S. 537 (1883) have said that appropriate restrictions must be recognized abroad, but no case can be found in which the foreign court was compelled by due process or full faith and credit to honor either charter limitations or the statutory restrictions enacted by the incorporating state.

7. Charter restrictions classified as "local" appear in the following cases: *Bank of Augusta v. Earle*, *supra* note 6; *Warner v. Foshay*, 57 F.2d 656 (8th Cir. 1932); *Heirs & Adm'r of Hitchcock v. United States Bank of Penn.*, 7 Ala. 386 (1845); *White v. Howard*, 38 Conn. 342 (1871).

8. One exception might be the case of *The Whitman Mining Co. v. Baker*, 3 Nev. 386 (1867). In that case the court said this: "If we permit a foreign corporation to conduct mining operations and acquire real estate within our limits, it appears to us our legislature is the proper power to limit that corporation in the extent of its acquisitions, and not the legislature in another state which grants the charter. If the legislature of another state were to create a corporation to conduct mining operations in this state and authorize it to buy and hold a million acres of land, our legislature might prohibit their

tion of the corporate charter provisions. Accordingly, lawyers at this time wisely began their research by scrutinizing the charter and the laws of the incorporating state.

The policy of limiting corporate power by charter restrictions, however, was strongly opposed by businessmen⁹ who, in managing corporations, were annoyed by restrictions denying them the right to arrange convenient and profitable transactions in the best interests of the enterprise, and by others who were equally annoyed by the defense of *ultra vires*, which, in its extreme form, had supported decisions that corporations could do no wrong because their charters did not authorize wrongs.¹⁰ This opposition eventually induced the courts to make inroads into the policy by deciding that some transactions, while far in excess of the express chartered powers, were authorized because necessary to the existence of the corporation or to the purposes for which it was formed,¹¹ and that the defense of *ultra vires* could not be raised in certain cases.¹² This tendency to enlarge the scope of corporate powers carried over into the field of foreign corporations where the courts were inclined to interpret charters in a way most favorable to the business interests, and, in a very real sense, a situation resulted in which the incorporating state was fast losing control over the foreign activities of its corporations. This great victory for the businessmen culminated near the end of the nineteenth century when the policy of limiting corporations by charter was abandoned in favor of restrictions imposed by positive legislation.¹³

buying more than one acre. On the other hand, if they were by their charter allowed to hold only one acre of land, our legislature might (by a general law, for it can pass no special law in regard to corporations) extend the right to buy a million acres. If under such a law the corporation purchased more than its original charter allowed, it might be amenable to some proceedings on the part of the State or Government granting the charter, but it would not whilst it remained a corporation lose its land under our laws."

9. See BERLE AND WARREN, *BUSINESS ORGANIZATIONS: CORPORATIONS* 46 (1948).

10. The doctrine that a corporation can do no wrong was the accepted notion in the days of Blackstone. See 1 BL. COMM. 476 (1756). But it has been rejected by modern courts. See *United States v. Nearing*, 252 Fed. 223, 231 (S. D. N.Y. 1918); *Cohen v. United States*, 157 Fed. 651, 653 (2d Cir. 1907); *Cornford v. Carelton Bank*, 1 Q. B. 392 (1889). "In one sense, every corporation has 'power' to do wrong, and also 'capacity' to suffer the consequences for wrongdoing, but 'power' should not be confused with 'capacity' and 'authority', and no corporation has 'authority' to violate an inhibition or go beyond the limits of its charter." *Yonkers v. Downey*, 309 U. S. 590, 597 (1940). See Harno, *Privileges and Powers of a Corporation*, 35 YALE L. J. 13, 18 (1925).

11. As early as *Sutton's Hospital case*, 10 Coke 23A, 30B (1613) the idea had been advanced that a corporation could have "implied" powers as well as explicit powers, but the real inroads came later in cases like the following: *Jacksonville, M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514 (1896); *Alton Mfg. Co. v. Garrett Biblical Inst.*, 243 Ill. 298, 90 N. E. 704 (1910); *Malone v. Lancaster Co.*, 182 Pa. 309, 37 Atl. 932 (1897).

12. See *Morris v. Hall*, 41 Ala. 510 (1868); *Schlitz Brewing Co. v. Missouri Poultry & Game Co.*, 287 Mo. 400, 229 S. W. 813 (1921). See also cases collected in 14A C. J. 319, 18 C.J.S. § 49d, *Corporations* p. 430. "There is a somewhat new and growing doctrine, that whether a corporation has acted in excess of its granted powers, or in face of an express or implied statutory prohibition is one which cannot be raised in litigation between it and a private party, but can only be raised by the state." *City Coal & Ice Co. v. Union Trust Co. of Maryland*, 140 Va. 600, 607-608, 125 S.E. 697, 699 (1924).

13. There is no doubt that the change in policy was a victory for businessmen because the general incorporation laws which replaced the idea of charter limitations now make it easy for corporations practically to define their own powers by drawing appropriate char-

This change in policy completed the freedom that foreign courts could exercise in deciding cases concerning the powers of foreign corporations, because the statutory restrictions of the incorporating state, of their own force, could have no extraterritorial effect,¹⁴ and, with the charter no longer an instrument designed to limit corporations, no mechanics remained by which the incorporating state could control the out-of-state activities of its corporations. It is true that the state of incorporation can still institute quo warranto proceedings against a corporation which has violated its charter abroad, and the fact that the foreign state has permitted the exercise of the prohibited power in no way limits this right. Yet, the acts upon which the quo warranto action is based in such a situation already are consummated, and, except for the ouster proceedings, it should be for the foreign court to determine their effect.¹⁵ Injunction proceedings brought by the state of incorporation¹⁶ or by shareholders in the incorporating state could, at most,¹⁷ only prevent threatened ultra vires acts abroad, because it is clear that once the corporation has acted no one will be permitted to enjoin the foreign state to look to the laws of the incorporating state to determine the effect of that action. Nor is there anything in the federal Constitution which would compel the foreign state in deciding the consequences to be attached to the exercise of corporate powers within its territory to refer to the laws of the

ters or amending existing ones. See BERLE AND WARREN, *BUSINESS ORGANIZATIONS: CORPORATIONS* 47 (1948).

14. Except insofar as the due process and full faith and credit provisions of the federal Constitution compel one state to give operative effect to the laws of another. It is pointed out later in this paper that neither of these constitutional limitations on state power in the field of conflict of laws will be invoked in cases where the foreign state has as great an interest in the subject matter of the dispute as the state of incorporation.

15. Furthermore, the foreign state, by domestication proceedings, can preserve the legal existence of a corporation put out of business by quo warranto proceedings instituted by the incorporating state.

16. The courts are not in agreement whether a state can enjoin threatened ultra vires acts. Some courts have held that quo warranto proceedings are the exclusive remedy. *Att'y Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371 (N. Y. 1817); *Att'y Gen. v. Tudor Ice Co.*, 104 Mass. 239 (1870). But other courts have held that the state may bring such an action. *Trust Co. of Georgia v. State*, 109 Ga. 736, 35 S. E. 323 (1900); *Columbian Athletic Club v. State ex rel. McMahan*, 143 Ind. 98, 40 N. E. 914 (1895); *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, N. W. 1020 (1889).

17. There is still some question whether or not this type of equity decree is entitled to full faith and credit. Professor Beale took the position that "An equitable decree for the doing of an act, except the mere payment of money, is not by our law enforceable in another court, even of the same state; there is no form of proceedings for enforcing the merely personal decree of a court of equity except by order of the court rendering it." 3 BEALE, *SUMMARY OF CONFLICT OF LAWS, CASES ON THE CONFLICT OF LAWS* 536, 537 (1902). But, most text writers have not agreed with Beale. See STUMBERG, *CONFLICT OF LAWS* 96-97 (1937); GOODRICH, *CONFLICT OF LAWS* 561 (1938). See also, Cook, *Powers of Courts of Equity*, 15 COL. L. REV. 37 (1915); Barbour, *The Extra-territorial Effect of the Equitable Decree*, 17 MICH. L. REV. 527 (1919); Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land*, 34 YALE L. J. 591 (1925). The courts are not agreed on the question. Compare *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676 (1894) with *Burnley v. Stevenson*, 24 Ohio St. 474 (1873). While it is difficult to understand why final equity decrees should not be entitled to full faith and credit since they clearly come within the meaning of the legislation implementing the "full faith and credit" clause, the point will not be set at rest until the United States Supreme Court decides it.

state of incorporation. Of course, it has been held that a serious error by a state court in applying choice of law principles violates the "due process" clause of the Fourteenth Amendment.¹⁸ If all the contacts of a case are in state X, and state Y, the forum, nevertheless, insists on applying its own local law, it seems desirable in the interests of uniformity and the expectations of the parties to nullify state Y's provincialism by invoking the "due process" clause.¹⁹ But, where the contracts are split between state X and state Y, it would be an unjustified imposition to compel the latter to refer to the laws of the former, and the Supreme Court of the United States has indicated that it will not invoke due process in such a case.²⁰ In the problem at hand, the foreign state has at least as great an interest in the matter as the incorporating state, and there is no reason why it should not be able to utilize its own laws if it so desires. Likewise, a resort to the full faith and credit provisions of the Constitution where the limitation has been imposed by statute would be futile. Until recent times the Supreme Court has not required full faith and credit to be given to statutes even though the enabling act implementing the clause clearly indicated that statutes were entitled to the same consideration as judgments. Be that as it may, the "full faith and credit" clause, like due process, cannot be invoked to compel a state to refer to the laws of another state when the former has as great an interest in the controversy as the latter.²¹

It is not surprising, then, to find a decision by the United States Supreme Court to the effect that a foreign state violates no constitutional principles in allowing corporations to exercise greater powers in its territory than the corporate charter would allow. In *Stone v. Southern Illinois & Mo. Bridge Co.*,²² an Illinois corporation was formed for the purpose of erecting and maintaining a bridge across the Mississippi river. Although its charter did not give it the power of eminent domain, the corporation, acting pursuant to a Missouri statute, condemned land in Missouri. Missouri landowners resisted the condemnation on the grounds that the Illinois corporation was denied this right by its charter, but the Supreme Court of Missouri found for the corporation. On appeal to the United States Supreme Court the decision of the lower court was affirmed. The Court said that the question of whether or not an Illinois corporation can exercise eminent domain powers in Missouri notwithstanding the fact its charter did not give it this power "involves the powers of corporations under the laws of Missouri, which (is) concluded by the adjudication of the state supreme court. . . . In our view no federal right was taken from the plaintiff in error by the

18. *Hartford Acc. & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U. S. 397 (1930); *Western Union Tel. Co. v. Brown*, 234 U. S. 542 (1914).

19. See GOODRICH, *CONFLICT OF LAWS* 22 (1938).

20. See, e.g., *Alaska Packers Assn. v. Industrial Acc. Comm'r*, 294 U. S. 532 (1935).

21. *Alaska Packers Ass'n v. Industrial Acc. Comm'r*, *supra* note 20; *Pacific Employers Ins. Co. v. Industrial Acc. Comm'r*, 306 U.S. 493 (1939).

22. 206 U. S. 267 (1907), *aff'g* 174 Mo. 1, 73 S. W. 453 (1903).

action complained of under the laws as interpreted by the Supreme Court of the State of Missouri."

While it is clear that the foreign court is not compelled to refer to the corporate charter or the laws of the incorporating state in deciding what powers a corporation can exercise in its jurisdiction, a great deal of confusion has resulted from the continued use of concepts and theories developed during the period of time when the charter was used to limit corporate power and when it was thought that the incorporating state could completely control the foreign activities of its corporations through appropriate charter restrictions. Because decisions are often based on these antiquated concepts, some courts undoubtedly have been led to believe that they are not competent to allow foreign corporations to exercise powers in excess of their charters. For example, in *Diamond Match Co. v. Powers*,²³ a Delaware corporation sought a writ of mandamus to compel the register of deeds of a Michigan county to make title facilities available to it in order that the preliminary steps to the purchase of land might be taken. The court refused to issue the writ on the ground that the corporation's charter did not authorize it to purchase land. The court said: "Unless the state of Delaware, to which it owes its existence and within whose dominion it belongs, has legally empowered it to deal in land and in land titles, it cannot engage in such affairs in Michigan. . . . It (Michigan) may stop short and tolerate but a part of relator's chartered powers, or a limited rather than a full exertion of them. But, it will never concede permission to go beyond the charter." It may be, of course, that the court was using charter limitation concepts as a choice of law device to make reference to the laws of Delaware, but it seems more probable that the court thought it was bound to honor the charter restriction, since the traditional choice of law reference in cases involving land is to the situs state.²⁴

In *Southwestern Tel. Co. v. Kansas City S. & G. Ry. Co.*,²⁵ a Texas utility was formed for the purpose of operating telegraph and telephone lines in five counties in Texas. Although its charter limited its operations to these counties, the corporation began doing business in Louisiana and attempted to condemn land there. The Louisiana court denied the company the right of eminent domain by stating that, while the policy of the state was to encourage the development of communication companies, this policy could not be used to give a foreign corporation greater powers than its charter had provided. Here it seems clear that Louisiana thought it had to honor the charter limitation, because an application of either the usual conflict of laws choice of law rules for cases involving eminent domain²⁶ or of local public policy would have dictated a contrary decision.

23. 51 Mich. 145, 16 N. W. 314 (1883).

24. *White v. Howard*, 38 Conn. 342 (1871); *Whitman Gold & Silver Mining Co. v. Baker*, 3 Nev. 386 (1867); *Tarpy v. Deseret Salt Co.* 5 Utah 494, 17 Pac. 631 (1888).

25. 108 La. 691, 32 So. 958 (1902).

26. *Stone v. Southern Ill. & Mo. Bridge Co.*, 206 U. S. 267 (1907), *aff'd* 174 Mo.

Ordinarily, however, the use of charter limitation concepts appears to be a choice of law device leading to the same result which would have been reached had reliance been placed on traditional conflict of laws rules. Thus, if the prevailing choice of law rule requires a court to refer to the laws of another state, this reference is usually accomplished in cases involving foreign corporations by classifying germane charter limitations as "general", intended to be effective everywhere, or by determining that the laws of the incorporating state are part of the corporate charter which travel with it and restrict the corporation wherever it goes. On the other hand, if the choice of law rules dictate a reference to local laws only, the charter limitations are by-passed on the ground that they are "local" prohibitions, intended to be effective solely in the incorporating state, or that legislation enacted by the incorporating state is "procedural" or is not of the type that becomes part of the charter. In *Turner v. Goetz*,²⁷ for example, a reference is made to foreign legislation by finding that it became part of the charter and hence had extraterritorial effect. The Turner Manufacturing Company was organized under the laws of Delaware but was doing its principal business in Wisconsin. It entered into a contract in Wisconsin with plaintiff, a resident of Wisconsin, for the purchase of its own shares of stock. By Delaware law such a purchase could be made only out of surplus, but by the laws of Wisconsin the purchase could be made out of capital. The corporation had no surplus, and, when it went bankrupt, the plaintiff brought suit for a part of the purchase price still due. The lower court held for the plaintiff on the theory that the validity of the contract was to be determined by Wisconsin law, but on appeal it was held that the lower court should be reversed. The court said that corporations may come into existence only on such terms as the legislature of the state of creation may prescribe, and one of the conditions under which the incorporators were permitted to bring the Turner company into existence was that the corporation should not have the right to purchase its own stock except out of surplus. And, being so limited by the laws of Delaware, concluded the court, the corporation could not gain authorization from the laws of Wisconsin to purchase stock out of capital. It could be that the Wisconsin court felt that it was compelled to judge the case by Delaware law, but it is more reasonable to assume that Delaware law was utilized because the case involved the internal affairs of a corporation which, as a choice of law matter, are usually determined by referring to the laws of the state of incorporation.²⁸ Such a choice of law is desirable because the shareholders are led to expect that the laws of the incorporating

1, 73 S. W. 453 (1903); *Hagerla v. Mississippi River Power Co.*, 202 Fed. 776 (S. D. Iowa 1913); *Central Hanover Bank v. Pan-American Airways, Inc.*, 137 Fla. 808, 188 So. 820 (1939); *New York, N. H. R. R. v. Welsh*, 143 N. Y. 411, 38 N. E. 378 (1894); *Northwestern Electric Co. v. Zimmerman*, 67 Ore. 150, 135 Pac. 330 (1913).

27. 184 Wis. 508, 199 N. W. 155 (1924).

28. *Southern Sierras Power Co. v. R. R. Comm'n of Cal.*, 205 Cal. 479, 271 Pac. 747 (1928); *In re Fryeburg Water Co.*, 79 N. H. 123, 106 Atl. 225 (1919); *Dunham v. Chemical Bank and Trust Co.*, 180 Okla. 537, 71 P.2d 468 (1937); *Clark v. Memphis*

state will be used to solve such questions, but it is one thing to say that the forum should refer to these laws as a matter of propriety and another to say that the reference must be made regardless of the forum's own notions of justice and the ends of law.²⁹ Wisconsin undoubtedly invoked Delaware law in this case because it thought such a choice would enable it to reach a just result, and not because it felt that it could not refuse such a reference if it had been so inclined. But if this is true, the decision is misleading because, at first blush at least, the impression is created that the court had no choice of law and was compelled to use Delaware law even though such a reference would violate some local policy.

*Warner Co. v. Foshay*³⁰ well illustrates how courts sometimes characterize charter limitations as "local" and statutory limitations as "procedural" or as not being a part of the charter in order to give operative effect to local law. The Warner company, a Minnesota corporation, loaned money to the Foshay company, a Delaware corporation having its principal place of business in Minnesota, and a usurious rate of interest by the laws of both states was charged. According to Delaware law no corporation could interpose the defense of usury, and this disability was to be made a part of every charter of all Delaware corporations. When Warner company sued in the Minnesota federal district court for the principal and interest, Foshay pleaded usury as a defense. The Warner company objected to the court's ruling that the defense was proper, and after the lower court had found for the defendant, it appealed. The Circuit Court of Appeals in affirming the lower court held that the contract was governed by Minnesota law because it was made in Minnesota, was to be performed in Minnesota, and the parties intended this law to be applied. In answering the contention that the Foshay company had no power under its charter to plead usury as a defense, the court held that the Delaware statute was procedural and was not intended to have any effect outside of the state, and, while the prohibition may have been incorporated into the charter of the company, it is a local prohibition only and does not limit the company in Minnesota. Moreover, the court said that not all parts of the charter travel with a corporation when it migrates to a foreign state, and it is this type charter limitation that does not accompany the enterprise.

It is difficult to argue with the result reached in this case, but to classify the Delaware statute as a local prohibition only seems dubious in the light of its legislative history. An earlier case, *M. Lowenstein v. British-American*

St. Ry., 123 Tenn. 232, 130 S. W. 751 (1910). See *Central Life Securities Co. v. Smith*, 236 Fed. 170, 176 (7th Cir. 1916); *Golden v. Cervenka*, 278 Ill. 409, 440, 116 N. E. 273, 286 (1917); *Dunbar v. American Tel. & Tel. Co.* 238 Ill. 456, 485-487, 87 N. E. 521, 533 (1909).

29. Even where there is every reason to refer to the laws of the state of incorporation, as in cases relating to the internal affairs of the company, it is still possible for the forum to refuse the reference. See *State ex rel Weede v. Iowa Southern Utilities Co. of Delaware*, 231 Iowa 784, 2 N.W.2d 372 (1942).

30. 57 F.2d 656 (8th Cir. 1932).

Mfg. Co.,³¹ had avoided a previous Delaware statute denying corporations the right to set up usury as a defense by stating that the statute was intended to be effective only in Delaware. But the court indicated that had the statute been made a part of every corporate charter it would have governed. Possibly as a result of this case, the statute was amended to provide that it was to be made a part of every corporate charter. Nevertheless, the *Foshay* case classified it as local. This is some evidence that the forum does not decide these cases by carefully considering whether or not the limitation involved was intended by the incorporating state to be local or general, procedural or substantive, or of a type that travels or does not travel with the charter. On the contrary, it utilizes its own conflict of laws rules to determine whether or not a reference should be made to foreign law, and having decided, either makes the reference by classifying the limitation as general or refuses it by classifying the limitation as local. Thus, the same restriction is sometimes classified by one court as general and by another court as local. Compare, for example, the case of *White v. Howard*³² with *Starkweather v. American Bible Society*.³³ In the *White* case, land located in Connecticut was devised by a testator domiciled in that state to the American Tract Society, a New York charitable corporation. The Statute of Wills of New York prohibited this corporation from taking land by devise, but Connecticut law was otherwise. In determining the validity of the gift the Connecticut court found that the New York Statute of Wills was intended as a local prohibition only and hence did not limit the power of the American Tract Society to take land in Connecticut. In the *Starkweather* case, the American Bible Society was a charitable corporation incorporated under the laws of New York, and like the American Tract Society in the *White* case, it was prohibited by the New York Statute of Wills from acquiring real estate. In a suit in Illinois to determine whether or not it could receive Illinois land under the will of a testator who died domiciled in that state, the court held that it could not. Said the court: "Appellee contends that the Statute of Wills of New York only operates as a disability upon all persons in that state to become devisors of real estate to this company, and that the charter does not prevent them from receiving lands in other states, by devise, from persons beyond the limits of the state, and hence this devise is valid and binding. We have seen that the courts of New York have held that such companies are not authorized to take and hold property in that state; and it incapable of doing so there, how, it may be asked, can it exercise powers and discharge functions beyond the limits of that state which created and endowed it with its powers and functions? Such bodies have such powers, only, as are conferred upon them by the laws of the state in which they are created." While these two cases may be harmonized by showing that Illinois

31. 300 Fed. 853 (D. Conn. 1924).

32. 38 Conn. 342 (1871).

33. 71 Ill. 50, 22 Am. Rep. 133 (1874).

and Connecticut have different choice of law rules relevant to situations in which foreign charitable corporations are devised land, or by claiming that one court used charter limitation concepts as a choice of laws device whereas the other considered itself bound absolutely to honor the restrictions which the incorporating state had placed on its corporations, the decisions demonstrate that a lawyer will be hard put to predict the result of a controversy by merely considering the charter or legislative restraints imposed by the state of incorporation. He will be on safer ground if he determines whether or not the forum thinks it has a choice of law and, if so, what that choice is.

By the same reasoning, it is futile to try to gain insight into the question of the powers of foreign corporations by studying the charter or the laws of the incorporating state with a view toward learning whether or not some particular statute has been so consolidated into the charter that it will travel with the corporation when it does business in foreign states.³⁴ While it is clear that some courts feel they are bound to honor all extraterritorial restrictions placed on corporations by the creating state, others will either utilize or avoid these restrictions according to their own choice of law rules. Consider, for example, the cases of *Canada Southern R. R. Co. v. Gebhard*³⁵ and *Washington-Alaska Bank v. Dexter Horton National Bank*.³⁶ In the *Alaska Bank* case, a bank was incorporated under the laws of Nevada and was doing its principal business in Alaska. By the laws of Nevada certain depositors were entitled to priority in payment, but Alaska recognized no such priority. When the bank went into the hands of receivers, the plaintiff, domiciled in Alaska, sued there to establish a priority. The court denied his claim on the ground that the Nevada statute did not become a part of the charter which the corporation carried with it when it migrated to Alaska. In the *Canada Southern Railroad* case, the railroad, a Canadian corporation, became financially embarrassed, and Parliament authorized it to enforce upon its mortgage creditors a settlement by which they were to receive other securities in place of their mortgage bonds. Although the scheme was approved by the majority of the bondholders, certain mortgage creditors domiciled in the United States objected to the plan, and they brought suit in federal court to have it set aside. The United States Supreme Court eventually got the case and recovery was denied. Mr. Chief Justice Waite based his decision on the notion that the legislation became part of the charter and hence affected creditors equally at home and abroad. Said he, "A corporation must dwell

34. Morawetz stated that "The charter contract alone is recognized. It is the charter alone which is recognized by the laws of comity, and not the general legislation of the state in which the corporation was formed. The general laws and regulations of a state are intended to govern only within the limits of the state enacting them, and a state would have no power to give them extraterritorial force." 2 MORAWETZ, PRIVATE CORPORATIONS 967 (1886). But such a test would not enable lawyers to predict the results of these cases, because the courts often state that some legislation travels with the charter, and one court has said that no distinction should be made between charters and statutes. See *McGill v. Commercial Credit Co.*, 243 Fed. 637, 652 (D. Md. 1917).

35. 109 U. S. 527 (1883).

36. 263 Fed. 304 (9th Cir. 1920).

in the place of its creation, and cannot migrate to another sovereignty, though it may do business in all places where its charter allows and the local laws do not forbid. But wherever it goes for business it carries its charter for that is the law of its existence, and the charter is the same abroad as it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere." It is suggested that all parts of the charter traveled in the *Canada Southern Railroad* case because that case involved internal affairs of a corporation and hence the forum's conflict of laws rules indicated that a reference should be made to the laws of the incorporating state;³⁷ all parts of the charter did not travel in the *Washington-Alaska Bank* case because the forum's conflict of laws dictated that no reference should be made to the laws of the incorporating state to determine preferential payments in view of insolvency.³⁸ Yet, the legislation in both cases dealt with creditors' rights against financially embarrassed corporations, and a lawyer attempting to predict the results of these cases by merely studying the legislation itself and the corporate charters might be considerably perplexed by the decisions.

Nor should the lawyer examine foreign legislation to ascertain whether it is procedural or substantive, for the cases indicate that the forum often will make whatever classification is necessary to give operative effect to its own choice of law rules.³⁹ In discussing *Warner v. Foshay* it was observed that the Delaware statute denying corporations the defense of usury was classified as procedural and thus rejected in favor of local law. But in *Freeze v. Brownell*⁴⁰ a different court classified a similar New York statute as substantive. Though it is possible that these cases were decided by honestly considering the statutes involved, it seems more likely that the courts were more concerned with the question of whether or not a reference to the laws of the incorporating state should be made than they were in determining whether or not the statutes were actually intended to be procedural or sub-

37. "Nor does *Canada Southern Ry. Co. v. Gebhard* . . . relied upon by the appellant, support the contention. That case only laid down the doctrine recently affirmed by this court . . . that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized . . ." *Second Russian Ins. Co. v. Miller*, 268 U. S. 552 (1925).

38. *McLean v. Tucker*, 26 Cal. App.2d 126, 130-131, 78 P.2d 1168, 1170-1171 (1938); *Warren v. First National Bank of Columbus*, 149 Ill. 9, 24-25, 38 N. E. 122 125-126 (1893); *Boehm v. Rall*, 51 N. J. Eq. 541, 545-546, 26 Atl. 832, 834 (N. J. Ch. 1893); *Pairpoint Mfg. Co. v. Philadelphia Optical Co.*, 161 Pa. 17, 22, 28 Atl. 1003 (1894). See *Borton v. Brines-Chase Co.*, 175 Pa. 209, 211, 34 Atl. 597 (1896).

39. See Lorenzen, *The Statute of Frauds*, 32 YALE L. J., 311 (1923); Stumberg, *CONFLICT OF LAWS*, 148 (1937); Cook, *Substance & Procedure in the Conflicts of Laws*, 42 YALE L. J. 333 (1933); McClintock, *Distinguishing Substance and Procedure*, 78 U. OF PA. L. REV. 933 (1930).

40. 35 N. J. L., 285, 10 Am. Rep. 239 (1871).

stantive. Different results were reached because of the difference in choice of law rules, and not because of any disparity in the two statutes.

Thus, it appears that a great deal of unnecessary confusion has been brought about because the courts continue to use the language and concepts of the late departed but unlamented theory of charter limitations. This confusion, which has led some courts erroneously to believe that they are compelled to honor restrictions placed on corporations by the incorporating state even in the face of some contrary local public policy and has induced lawyers to approach the question by considering charter provisions and foreign legislation rather than the choice of law rules of the forum, should be ended by clear cut holdings that the forum is competent to resolve the problem in accordance with its own conflict of laws rules. Some progress is being made in this direction, but it seems likely that many courts for some time will continue to talk about charter limitations, procedural and substantive restrictions and legislation traveling or not traveling with the charter, and the present confusion will continue unless lawyers realize that their research must commence with a consideration of whether or not the forum thinks it has a choice of law, and, if so, what that choice is. Only then will clarification be possible.